

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

K2M, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 17-61 (RGA)
	)	
ORTHOPEDIATRICS CORP. and	)	
ORTHOPEDIATRICS US DISTRIBUTION	)	
CORP.,	)	
	)	
Defendants.	)	

**JOINT STATUS REPORT**

Pursuant to the Court’s March 4, 2021 Order, Plaintiff K2M, Inc. (“K2M”) and Defendants OrthoPediatics Corp. and OrthoPediatics US Distribution Corp. (collectively “OrthoPediatics”) submit this Joint Status Report presenting their respective positions about the trial in the above-captioned matter that is currently set to take place on April 12, 2021. The parties would welcome a call with the Court to discuss the issue.<sup>1</sup>

**K2M Inc.’s Position**

K2M prefers to go forward with a live, in-person jury trial beginning on April 12, 2021. K2M has significantly narrowed its asserted claims for trial and understands that OrthoPediatics is in the process of narrowing its defenses. As a result, K2M anticipates that trial can be completed within the five days currently allotted by the Court. Consistent with the Court’s Jury Trial Restart Guidelines, K2M believes that an in-person jury trial can be conducted safely

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<sup>1</sup> The Court has currently set a pretrial conference for March 26, 2021 at 8:30am. To the extent the Court is considering postponement of the trial, the parties respectfully request a status conference to discuss scheduling prior to March 26 so they do not unnecessarily expend resources preparing for trial.

and effectively. K2M has offered to accommodate any additional, reasonable safety protocols that OrthoPediatics may suggest. K2M is also willing to allow OrthoPediatics' witnesses to appear remotely or by deposition if necessary. K2M is also amenable to working with the Court and OrthoPediatics to find other ways to ensure the safety of the participants.

This case has been pending since January 20, 2017. The case was litigated actively until July 10, 2018, when it was stayed pending inter-partes review ("IPR"). All of OrthoPediatics' IPR petitions were unsuccessful: the Patent Trial and Appeal Board ("PTAB") affirmed all claims that were challenged in two IPRs and refused institution for three additional IPR petitions. Subsequently, this Court lifted the stay on October 10, 2019. Since then, the parties have completed fact and expert discovery, and the case is ready for trial.<sup>2</sup> Having waited more than four years, K2M is eager to have a jury decide its claims. Accordingly, K2M's witnesses, attorneys, staff, and client representatives are prepared to go forward with a live, in-person jury trial beginning on April 12, 2021.

Nevertheless, K2M understands that while the COVID-19 pandemic conditions have been improving and more and more people are being vaccinated every day, the pandemic is not over, and the safety of jurors, the Court and its staff, the witnesses, and all trial participants including counsel is paramount. Thus, if the Court concludes that an in-person jury trial cannot be conducted safely at this time, K2M respectfully requests that any delay be modest and that trial be rescheduled for as soon as practicable once it is safe to do so. K2M can be ready in May or June if the Court wishes. If the Court is inclined to delay the trial, K2M requests that the case be reset for trial in July 2021, or as soon thereafter as the Court's schedule will permit.

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<sup>2</sup> The Parties' motions for summary judgment are pending.

### **OrthoPediatrics' Position**

Defendant OrthoPediatrics prefers to go forward with a live, in-person jury trial when it is safe to do so for the Court, its personnel, jurors, the witnesses, and the parties' attorneys. Unfortunately, preparing for, travelling to, and attending a trial on April 12, 2021 does not—at this time—appear to be safe.

As an initial matter, OrthoPediatrics—located in Warsaw, Indiana—has been following recommended health and safety precautions since the inception of the pandemic and has not yet asked its employees to return to work because of concerns related to COVID-19.

In OrthoPediatrics' view, the significance of the rights at stake, the complexity of the factual and legal issues, and the substantial amount in controversy, together require live, in-person presentation of evidence and argument for trial. To accomplish this, OrthoPediatrics' lay and expert witnesses will be traveling via airplane to Delaware from multiple states, including Indiana, Michigan, Texas, Illinois, and Tennessee. In addition, members of OrthoPediatrics' trial team will be traveling via plane to Delaware from Ohio. Currently, though, the CDC's travel guidelines state: "Cases are Extremely High. Avoid Travel" and recommend that "you do not travel at this time. ***Delay travel and stay home to protect yourself and others from COVID-19.***" <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> (emphasis in original).

The CDC's admonitions against travel are particularly relevant because—without disclosing sensitive and private health information—certain unvaccinated members of OrthoPediatrics' trial team and their family members have an increased risk of severe illness from the virus that causes COVID-19. *See, e.g.*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

OrthoPediatrics does not believe it is qualified to opine regarding whether the Court's Jury Trial Restart Guidelines (or any additional precautions) would be sufficient to conduct a safe, in-person jury trial. Nevertheless, those guidelines and precautions do not address the risks associated with the travel that would be necessary both to and from Wilmington.

Moreover, the District of Delaware has already suspended all jury trials (both criminal and civil) through April 5, 2021. In view of current projections regarding the timeframe for widespread availability of the COVID vaccine and the required loosening of travel and other restrictions in place in Delaware and across the country, proceeding with a jury trial on April 12 is not OrthoPediatrics' preferred path forward. In addition to health concerns, OrthoPediatrics believes that extensive pretrial preparations for an unlikely trial date would be unnecessarily disruptive to OrthoPediatrics' business and to its witnesses.

For all of these reasons, and because neither party would be prejudiced by a continuance of the trial, OrthoPediatrics respectfully requests a continuance of the current trial and pretrial deadlines.

If the Court agrees that an in-person jury trial is not advisable at this time in light of the above safety concerns, OrthoPediatrics asks that the Court reschedule the trial for as soon as practicable to allow enough time for the parties to resume and complete the substantial pretrial preparation, which likely would not be sooner than the first week of July 2021, or as soon thereafter as the Court's schedule will permit.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

*/s/ Rodger D. Smith II*

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March 11, 2021

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